ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	PR Docket No. 94-105

OPPOSITION OF AIRTOUCH COMMUNICATIONS TO THE PETITION FOR RECONSIDERATION OF THE CELLULAR RESELLERS ASSOCIATION

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SUMMARY

Despite the fact that the California Public Utilities Commission ("CPUC") has declined to seek reconsideration of the denial of its Petition, the Cellular Resellers Association ("CRA") continues to press for state rate regulation. However, under the Communications Act and the Commission's Rules, only states have the authority to petition for continued rate regulation of cellular service. There is, therefore, no legal basis for CRA to petition for continued state regulation of rates. Moreover, the record evidence fully supports the Commission's conclusion that continued state rate regulation is unnecessary because California's market conditions are adequate to protect subscribers from unjust and unreasonable rates. Finally, CRA's claim that a "regulatory void" will exist after preemption takes effect is meritless. The Commission will retain jurisdiction under the Communications Act to resolve intrastate rate disputes.

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Pursuant to Section 1.106(f) of the Commission's Rules, AirTouch Communications ("AirTouch") hereby submits its Opposition to the Petition for Reconsideration of the Cellular Resellers Association ("CRA Petition"). CRA seeks reconsideration of the Commission's denial of the Petition of the California Public Utilities Commission ("CPUC") to retain authority to regulate cellular service rates. CRA's Petition is deficient on several grounds and should be denied.

The CPUC has declined to seek reconsideration of the denial of its Petition demonstrating that it no longer seeks to regulate cellular service rates. CRA, however, continues to press for state rate regulation solely to insulate the resellers from competition in the CMRS marketplace. Yet, under the Communications Act and the Commission's Rules, only states have the authority to petition to continue rate regulation of

cellular service. The CPUC has effectively withdrawn its Petition. There is, therefore, no legal basis for CRA to petition for continued state regulation of rates when the CPUC has declined to do so.

Additionally, in stretching to make a case, CRA resorts to inadequate and, at times, inconsistent analysis which ignores the record evidence. CRA challenges the Commission's reliance on the fundamental changes in the duopoly market structure provided by the introduction of PCS and SMR services, but fails to identify any record evidence inconsistent with the Commission's findings. CRA also illogically cites the absence of evidence of anticompetitive activity or consumer dissatisfaction with cellular service as the basis for continued state regulatory intervention. Contrary to CRA's claim, the record evidence demonstrates that continued state rate regulation is unnecessary because California's market conditions are adequate to protect subscribers from unjust and unreasonable rates.

Finally, CRA contends that a "regulatory void" will exist after preemption of state rate regulation. In light of the absence of evidence of anticompetitive activity, CRA has not demonstrated that resolution of this issue is material to this proceeding. In any event, no "regulatory void" will exist because the Commission will retain jurisdiction under the Communications Act to resolve intrastate rate disputes.

I. CRA CANNOT REQUEST CONTINUED STATE REGULATORY AUTHORITY WHEN THE CPUC HAS DECLINED TO DO SO.

Both Congress and the Commission made clear that only states or their authorized representative could petition for authority to regulate cellular service rates. Congress placed the burden solely on the petitioning states to demonstrate that "market conditions with respect to [CMRS] fail to protect subscribers adequately from unjust and unreasonable rates . . . ."[1] Similarly, under the Commission's Rules only the "state agency responsible for the regulation of telecommunication services provided in the state" had the authority to file a petition.[2] The Commission determined that interested parties were only entitled to file comments in support of or opposition to a state's petition.[3] There is no provision in the Commission's rules allowing an interested party to advocate continued rate regulation in the absence of a request by the responsible state agency.[4]

The CPUC's Petition sought authority to continue to regulate cellular service rates until March 1, 1996. The CPUC did not request indefinite authority to mediate rate disputes

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1 47 U.S.C. § 332(c)(3)(B); see also Report and Order (PR Docket No. 94-105), adopted May 5, 1995, released May 19, 1995, ("Report and Order") at ¶ 16.

2 In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services (GN Docket 93-252), Second Report and Order, adopted Feb. 3, 1994, released March 7, 1994, 9 FCC Rcd 1411, 1522.

3 Ibid.

4 In contrast, the Commission specified that an interested party could petition for discontinuance of state authority for rate regulation. Ibid.

between the resellers and the carriers, as requested by CRA. The CPUC similarly did not present the detailed description of the rules necessary for resolution of such disputes.[5] Thus, the CPUC has neither requested, nor presented the record evidence and rules to justify, the authority to resolve rate disputes between resellers and cellular carriers. Most importantly, the CPUC has declined to seek reconsideration of the Commission's denial of its Petition, indicating that it no longer seeks to regulate cellular service rates. The CPUC has, therefore, effectively withdrawn its Petition to continue cellular rate regulation. Because such a petition can only be filed and prosecuted by a state or its authorized representative, there is no legal basis for CRA independently to seek reconsideration of the Commission's decision. Under such circumstances, it would be contrary to the Congressional intent underlying the Communications Act, as well as the Commission's Rules, to grant CRA's request for reconsideration.

II. THE RECORD EVIDENCE IS CONSISTENT WITH THE FINDING THAT CALIFORNIA MARKET CONDITIONS ARE ADEQUATE TO PROTECT SUBSCRIBERS FROM UNJUST AND UNREASONABLE RATES.

CRA challenges the Commission's reliance on two factors supporting the denial of the CPUC's Petition: the competition provided by new wireless services providers and the absence of evidence of widespread anticompetitive practices and consumer

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5 The Commission required petitioning states to identify and provide a detailed description of the specific existing or proposed rules that they would continue or establish. Id. at 1522.

dissatisfaction with cellular service.[6] CRA Petition at 1-2. Contrary to CRA's claim, the Commission's findings with respect to these two issues are entirely consistent with the record evidence and demonstrate that market conditions in California are adequate to protect subscribers from unjust and unreasonable rates.

A. The FCC correctly assessed the competitive impact of the new wireless service providers.

CRA ignores the competitive catalyst provided by PCS and SMR services and claims that the resellers warrant protection because they provide the only "meaningful competition" to cellular service.[7] The record evidence, however, repudiates CRA's claim that resellers provide "meaningful competition." Under the CPUC's regulation, resellers have had no incentive to offer their own innovative plans because their price has been tied to the carriers' retail offering. The record evidence confirms that California resellers have not been "price leaders"

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6 CRA claims that the Commission placed "substantial reliance" on these two factors. CRA Petition at 1. However, the Commission considered the "totality of the evidence" and based its decision on five factors: (1) declining rates in California; (2) the direct and fundamental changes in the duopoly market structure through the introduction of PCS and SMR services; (3) the absence of evidence of anticompetitive practices; (4) the absence of evidence of widespread consumer dissatisfaction and the regulation necessary to decrease such dissatisfaction; and (5) the absence of persuasive analyses regarding the cellular carriers' system investment. Report and Order, ¶ 97.

7 CRA argues that the Commission has found that "cellular resale is important competitive force." CRA Petition at 6. However, CRA fails to acknowledge that there has never been a federal requirement that carriers offer separate wholesale and retail rates. See Cellular Resale Order, 6 FCC Rcd 1719, 1726 (1991).

and have seldom introduced retail offerings different from those of the cellular carriers.[8]

CRA once again argues that continued regulation is warranted because the duopoly market structure will persist until PCS is operational in California.[9] CRA Petition at 2. The duopoly market structure is not a sufficient basis for continued state regulation. In rejecting the identical argument when proffered by the CPUC, the Commission concluded: "California has not explained how a standard apparently rejected by Congress could thereafter become the centerpiece of the test for evaluating state petitions."[10] CRA similarly provides no explanation why Congress would allow continued rate regulation merely on a showing of duopoly market conditions. As the Commission noted, "it is not plausible to conclude that Congress adopted a self-defeating statutory scheme."[11] Moreover, as the Commission found "[g]iven the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been."[12]

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8 GTE Comment at 61, 66-67; McCaw Opposition, Exh. A (Owen Decl.), at 38-39; U S WEST Opposition at 9; CPUC Petition at 25; BACTC Opposition at 12-13; AirTouch Opposition at 41.

9 CRA completely ignores the fact that the duopoly market structure has been eradicated by the entrance of Nextel.

10 Report and Order at ¶ 101.

11 Report and Order at ¶ 22.

12 Report and Order at ¶ 36.

CRA does not, and indeed cannot, point to record evidence inconsistent with the Commission's findings regarding the competitive stimulus offered by PCS and SMR providers. CRA does not challenge the Commission's reliance on the accepted antitrust principle that a firm may properly be included in competitive analysis if it could enter the market within two years.[13] Moreover, CRA concedes that PCS entry is a certainty and that it will occur within two years. CRA similarly does not dispute the Commission's observation that the significant financial investment of the PCS licensees provides additional incentive to become operational as soon as possible. Finally, the record evidence supports the Commission's finding that cellular carriers, faced with the impending entry of PCS, are lowering prices and adopting new technologies.[14] Under such circumstances, the Commission properly relied on the competitive impetus provided by new wireless service providers in concluding that market conditions are adequate to protect subscribers.

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13 Report and Order, ¶ 32.

14 Report and Order at ¶ 33. See AirTouch Opposition at 45-46; "Comments of AirTouch Communications On The Confidential Data Submitted By The California Public Utilities Commission In Support Of Its Petition To Rate Regulate California Cellular Service," dated Feb. 24, 1995, at 3.

As the Commission observed, cellular price declines have accelerated in the past year, with the best price for 60 minutes in the Los Angeles market falling by more than 15% in 1994. Additionally, AirTouch has introduced 16 new rate plans during the pendency of the CPUC's Petition.

B. The absence of evidence of consumer dissatisfaction supports the denial of the CPUC's Petition.

CRA concedes that the CPUC has not met its burden of proof because of "the absence of widespread anticompetitive behavior and consumer dissatisfaction."[15] CRA Petition at 5 (emphasis added). Unable to point to evidence in the record to prove its case, CRA now argues that states with existing regulation of cellular service should be relieved of their obligation to demonstrate consumer dissatisfaction or "other indicia of marketplace failure" to justify the continuation of regulation of cellular service rates. CRA Petition at 4. CRA's argument "would effectively allow an exception permitting regulation to nullify a general prohibition against it."[16] Contrary to CRA's claims, the CPUC's "burden is not so great that it is impossible to carry."[17] The CPUC had the resources to present evidence of anticompetitive activities and consumer dissatisfaction with cellular service if such evidence existed.[18]

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15 The California Attorney General has decided not to file an action in connection with its investigation of cellular service in California.

16 Report and Order at ¶ 22.

17 Report and Order at ¶ 26. The Commission adopted a "rule designed to elicit the information needed to make [the state's] showing." Report and Order at ¶ 15. "The comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions." Id. at ¶ 30. Otherwise, the Commission provided the states with discretion in preparing their Petitions. It is notable that CRA did not raise an objection to the criteria in its comments in connection with the Second Report and Order.

18 In fact, the record evidence demonstrates that California consumers are very satisfied with the quality of cellular

(continued...)

CRA's claim that the absence of such evidence is attributable to the CPUC's efforts is flatly at odds with the record evidence. As the Commission found, the CPUC has not "prescribed any particular pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in California appear to have been carrier initiated."[19] Thus, the CPUC cannot be given "credit" for the fact that rates are reasonable and nondiscriminatory, as CRA contends. Nor can the CPUC be given "credit" for the high quality of cellular service because the CPUC has found that regulation is not necessary to ensure service quality.[20] Thus, the Commission properly rejected the "CPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular rates will quickly fall outside the zone of reasonableness."[21] CRA has failed to present any new argument or evidence warranting a reversal of this finding.

CRA also contends that the CPUC has filled the necessary role of resolving reseller complaints regarding discriminatory conduct by the cellular carriers. CRA Petition at 5. However,

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18(...continued)
service. See, e.g., AirTouch Opposition at 52-54, CCAC Response at 64.

19 Report and Order at ¶ 98.

20 Decision No. 90-06-025, 36 CPUC 2d 464, 478 (1990); see also 36 CPUC 2d at 510 (Finding of Fact 27); CCAC Response at 63; McCaw Opposition at 31, Exh. B; AirTouch Opposition at 53-54; BACTC Opposition at 33-34; GTE Opening Comment at 25-26; LACTC Opening Response at 37-38.

21 Report and Order at ¶ 98.

the examples cited by CRA[22] are instances in which the resellers' protests focused not on protection of consumers, but on protection of a select group of competitors by mandating that the resellers' profit margin be incorporated into each rate element. These protests have harmed consumers by stifling innovation by the cellular carriers, delaying introduction of innovative offerings and providing an inflated profit margin and a price umbrella to shield the resellers from effective competition. Under such circumstances, there is no doubt that the "burden of demonstrating that continued regulation will promote competitive market conditions"[23] has not--and cannot--be met.

III. CRA HAS NOT DEMONSTRATED THAT THE COMMISSION'S JURISDICTION OVER INTRASTATE RATES IS A MATERIAL ISSUE THAT MUST BE RESOLVED IN THIS PROCEEDING.

In the absence of CPUC regulation of cellular service rates, CRA has requested that the Commission "assume jurisdiction over [resellers'] complaints and be prepared to dispose of them expeditiously." CRA Petition at 7. The Commission has concluded that it is not necessary to address its jurisdiction over intrastate rates for CMRS in this proceeding but that it would address the issue upon a showing through evidence and argument that resolution of the issue is necessary to resolve a

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22 See "CRA, CSI and Comtech Reply to Oppositions to the Petition of the People of the State of California and the Public Utilities Commission of the State of California," dated October 19, 1994, at 12-17.

23 Report and Order at ¶ 18.

material issue raised in the record.[24] CRA has not met that burden.

CRA claims that the denial of the CPUC's Petition unnecessarily exposes cellular resellers and other subscribers to the risk of unreasonable discrimination by cellular carriers. CRA Petition at 2. However, CRA concedes that discriminatory practices are not pervasive and that the record is devoid of consumer complaints. Based on this record, CRA has not shown that it is necessary for the Commission to resolve the issue of its jurisdiction over intrastate rates. Additionally, as CRA correctly observes, the issue of resolution of disputes involving intrastate rates affects consumers in all states. CRA Petition at 6. Accordingly, it would be appropriate to resolve this issue based on a more fully developed record than has been created in this proceeding.[25]

IV. THE COMMISSION WILL RETAIN THE JURISDICTION TO RESOLVE INTRASTATE SERVICE DISPUTES.

CRA claims, without support, that there will be a "critical void in regulatory authority" when preemption takes effect. See CRA Petition at 6. The Budget Act amended section 2(b) of the Communications Act specifically to exempt the Commission's authority provided in section 332(c) from the general prohibi-

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24 Report and Order at ¶ 147.

25 The Commission previously concluded that the issue should be resolved in connection with reconsideration of the CMRS Report and Order. Report and Order at ¶ 147.

tion on federal jurisdiction over intrastate communications.[26] Section 332(c) provides that CMRS is to be treated as a common carrier, subject to Title II regulation, except to the extent that the Commission decides to forbear from applying sections other than 201, 202 and 208.[27] There is nothing in section 332(c) that limits this authority only to interstate service.[28] Thus, the Commission now has jurisdiction over intrastate CMRS rates.

The absence in section 332(c) to a reference to intrastate service is irrelevant. Other sections similarly exempted in section 2(b) from the prohibition on the FCC's jurisdiction over intrastate service also do not specifically refer to intrastate rates. Yet the FCC has interpreted those sections as giving it authority over intrastate service. See, e.g., In the Matter of Regulations Concerning Indecent Communications by Telephone,

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26 Second Report and Order at ¶ 256 ("Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile services without regard to Section 2(b).").

27 Notice of Proposed Rulemaking In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services (GN Docket 93-252), 8 FCC Rcd 7988, 7898 (1993). Section 201 of the Communications Act requires, inter alia, that "[a]ll charges . . . for and in connection with such communication service, shall be just and reasonable, and any such charge . . . that is unjust and unreasonable is hereby declared to be unlawful . . . ." Similarly, section 202(a) of the Communications Act states that [i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . ." (Emphasis added.)

28 Congress amended section 2(b) to give the Commission jurisdiction over cellular rates in recognition that "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 111, 103d Cong., 1st Sess. (1993) at 260.

5 FCC Rcd 1011, 1012 (1990) (observing that section 223(b) extends to "intrastate as well as interstate communications," even though that section does not specifically refer to intrastate communications); In the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, 2740 (1992) (observing that section 227 gives the FCC jurisdiction over intrastate telephone solicitations despite the lack of any specific reference to intrastate communications).

In the absence of CPUC supervision carriers will not, as CRA contends, be free to unreasonably discriminate against the resellers or any other consumers. CRA Petition at 6. Cellular carriers remain bound by their obligations as common carriers under the Communications Act. Sections 201 and 202 of the Act prohibit unjust or unreasonably discriminatory rates, and section 208 provides a mechanism for resolving consumer complaints. Additionally, the Commission has determined that the CPUC may continue to conduct proceedings on complaints concerning matters involving only terms and conditions to the extent that state law provides for such proceedings.[29] Thus, there can be no "regulatory vacuum" as claimed by CRA.

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29 Report and Order at ¶ 146.

V. CONCLUSION.

For the foregoing reasons, CRA's Petition is procedurally and substantively deficient and must be denied. The record evidence supports the Commission's determination that market conditions in California are adequate to protect subscribers from unjust and unreasonable rates.

Dated: July 5, 1995.

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CERTIFICATE OF SERVICE

I, Jo Ellen Marsh, do hereby certify that copies of the foregoing "OPPOSITION OF AIRTOUCH COMMUNICATIONS TO THE PETITION FOR RECONSIDERATION OF THE CELLULAR RESELLERS ASSOCIATION" were sent via first class mail, postage prepaid, on this 5th day of July, 1995 to the following parties:

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